INDIANA JUDICIAL CENTER

CASE CLIPS

Selected decisions of the Indiana appellate courts abstracted for judges by the Indiana Judicial Center.

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CRIMINAL LAW ISSUES

MANN v. STATE, No. 15A05-0012-CR-512, ___ N.E.2d ___ (Ind. Ct. App. Aug. 3, 2001).
VAIDIK, J.

Finally, Mann claims that the State failed to provide evidence that he had previously been convicted of OWI under a similar statutory scheme. Thus, he asserts that his conviction for OWI as a Class D felony may not stand.

. . . .

In particular, Mann asserts that the State had the burden of proving that the Ohio statute under which he was previously convicted is substantially similar to Indiana's OWI statutes. During trial, Mann's attorney asked that the court take judicial notice of the relevant Ohio statute. His attorney requested a directed verdict and stated, "I ask for any judicial notice of Ohio statutes so the jury can compare, take a look at that, what the elements of the offense were . . . ." [Citation to Record omitted.] The trial court replied,

> That would be an issue of law, not an issue of fact for the jurors. At this point in time that can be, well, I'm not going to grant the directed verdict and the arguments that you can bring up can be argued in closing argument. Another chance to try and persuade the jury but the Court's not going to grant the directed verdict at this time.

[Citation to Record omitted.] After this exchange, the State and Mann presented closing arguments in which they discussed whether the State proved that the Ohio statute was substantially similar to Indiana's OWI statutes.

Under the Notice of Foreign Law Act ("the Act") [footnote omitted] the determination of foreign law shall be made by the court and not by the jury. Ind. Code § 34-38-4-3; *Revlett v. Louisville & N.R. Co.*, 114 Ind. App. 187, 51 N.E.2d 95, 98 (1943), *reh'g denied*. Further,

the Act applies to both civil and criminal cases. [Citations omitted.] . . .

The Act provides that Indiana courts shall take judicial notice of the common law and statutes of every state, territory and other jurisdictions in the United States. I.C. § 34-38-4-1. Furthermore, the court may inform itself of the foreign laws in question and may ask counsel to aid the court in obtaining this information. Ind. Code § 34-38-4-2. Finally, although a court may seek assistance from a party to inform itself of the foreign law, there is no factual burden on a party to prove the foreign law. *Harvest Ins. Agency, Inc. v. Inter-Ocean Ins. Co.*, 492 N.E.2d 686, 691 (Ind. 1986).

. . . Although the trial court correctly noted that the determination of foreign law is a question of law for the court, it seemed to place the question of whether the two statutes in questions were substantially similar before the jury for consideration. We conclude that the trial court should have taken judicial notice of the Ohio statute and determined that the statute was substantially similar to Indiana's OWI statutes. . . .

. . . .

BROOK and ROBB, JJ., concurred.

TOWNSEND v. STATE, No. 55A01-0006-CR-204, ___ N.E.2d ___ (Ind. Ct. App. Aug. 8, 2001).

SULLIVAN, J.

Townsend claims that it was error for the trial court to allow the State to amend the information the day before the scheduled trial because the amendment was one of substance, which he claims is not permitted under the governing statute, Ind. Code § 35-34-1-5 (Burns Code Ed. Repl. 1998). Townsend also claims that the amendment was improper in that it prejudiced his substantial rights.

. . . .

Townsend claims that the evidence here was not equally applicable to the information in the amended form, and is therefore an amendment of substance. Specifically, he claims that, under the original information, he would not have been required to present any evidence because the State's evidence demonstrated that he did not engage in tumultuous conduct. Under the amended information, however, Townsend was required to present a defense. Thus, he claims that the amendment should not have been allowed pursuant to I.C. § 35-34-1-5. However, even assuming that the amendment here was one of substance, [footnote omitted] we are not convinced that such are absolutely prohibited by statute.

. . . .

. . . [I]t is unclear whether an amendment of substance may be allowed after the time limits set forth in subsection (b). [Citation omitted.]

Some cases have interpreted I.C. § 35-34-1-5 to allow substantive amendments so long as the substantial rights of the defendant are not prejudiced. [Citations omitted.] Yet, in Haak v. State, 695 N.E.2d 944, 951 (Ind. 1998), our Supreme Court stated that substantive amendments may not occur after specified times in advance of the omnibus date as provided in subsection (b). [Footnote omitted.]

However, only a few months prior to Haak, our Supreme Court said, "Ultimately, the question is whether the defendant had a reasonable opportunity to prepare for and defend against the charges." Sides v. State, 693 N.E.2d 1310, 1313 (Ind. 1998). [Footnote omitted.] Furthermore, were we to read Haak as prohibiting any substantive changes after the specified times in subsection (b), the provisions for a continuance in subsection (d)

would be largely unnecessary. [Citation omitted.]

We find further support for our position in Tripp, [v. State, 729 N.E.2d 1061 (Ind. Ct. App. 2000)] supra, wherein the State amended the charging information after the omnibus date to include an additional charge. 729 N.E.2d at 1064. Although noting that this amendment was substantive, the court nevertheless held that the amendment was permissible because the defendant had not demonstrated how his substantial rights were prejudiced where he was given notice of the amendment, an opportunity to challenge the amendment, and granted a continuance to prepare a defense for the new charge. Id. at

1064-65. See also Parks v. State, No. 82A01-0007-CR-231, 2001 WL 688233, ___ N.E.2d ___ (Ind. Ct. App. June 20, 2001) (noting that trial court may allow substantive amendments to charging information provided the defendant is given reasonable notice and an opportunity to be heard).

. . . .

The amendment only changed the subsection of the disorderly conduct statute Townsend was alleged to have violated. . . . Townsend had an opportunity to challenge the amendment at the hearing on his motion to dismiss the amended charge. . . . Thus, it appears that Townsend had notice of the amendment. More importantly, the trial court granted Townsend a seven-day continuance to prepare a defense for the new charge. . . . Also, Townsend knew from the probable cause affidavit what conduct had led to his arrest and charge for disorderly conduct. Townsend had a reasonable opportunity to prepare for and defend against the amended charges. [Footnote omitted.]

Townsend has not demonstrated prejudice to his substantial rights resulting from the lateness of the amendment. . . .

. . . .

FRIEDLANDER and RILEY, JJ., concurred.

INDIANA DEP'T OF CORRECTION v. BOGUS, No. 67A04-0103-PC-90, ___ N.E.2d ___ (Ind. Ct. App. Aug. 9, 2001).

ROBB, J.

In 1989, Bogus was sentenced to twenty years' incarceration. While incarcerated, Bogus received an associate's degree in March of 1997 and a bachelor's degree in June of 1998. [Footnote omitted.] He had served nine years of his sentence when he was released to parole in June of 1998. His parole was subsequently revoked, and he was ordered to serve the remaining eleven years of his sentence. When Bogus' parole was revoked on January 27, 2000, DOC records showed that his projected date of release to parole was October 12, 2004, and his projected maximum release date was October 18, 2009.

Bogus filed a petition for post-conviction relief, alleging that his educational credit time should be applied "to reduce his fixed term from 20 year[s] to 17 years." [Citation to Brief omitted.] . . .

. . . .

Indiana Code section 35-50-6-3.3, as it was written at the time Bogus received his degrees, provided that:

. . . .

(c) Credit time earned by a person under this section is subtracted from the period of imprisonment imposed on the person by the sentencing court.

. . . .

In Renfroe [v. Parke, 736 N.E.2d 797 (Ind. Ct. App. 2000)], another panel of this court

addressed the effect of educational credit time on the fixed term of imprisonment. . . . This court held that immediately upon the date an inmate earns an educational degree described in section 35-50-6-3.3, the fixed term of imprisonment should be reduced by the appropriate amount of educational credit time. [Citation omitted.] . . .

Based upon the following analysis, we are compelled to disagree with Renfroe to the extent that case holds that the educational credit time should be deducted from the fixed term of imprisonment. Rather, we read the phrase "in addition to any credit time" as used in section 35-50-6-3.3 to mean that educational credit time should be treated as any other credit time, although it is a separate class of credit time that does not displace, but is to be added to, any other credit time the defendant earns. [Citation omitted.]

Credit time generally is applied to determine a defendant's release date from prison, but does not reduce the sentence itself. [Citation omitted.] In Boyd v. Broglin, 519 N.E.2d 541 (Ind. 1988), our supreme court discussed the impact of credit time on a defendant's sentence. Therein, the court stated that credit time "is earned toward release on parole for felons, and does not diminish the fixed term or affect the date on which the felony offender will be discharged." [Citation omitted.] . . . Boyd noted that "[i]f credit time were to act as a diminution of the sentence, there could be no parole period as created by Ind. Code § 35-50-6-1. Once a prisoner had served his sentence minus credit time, the sentence would be discharged and the state would have no hold over the prisoner." Id. at 543. Rather, Indiana Code section 35-50-6-1 provides that "[a] person whose parole is revoked shall be imprisoned for the remainder of his fixed term." Ind. Code § 35-50-6-1(c). Thus, although credit time can get a defendant out of prison in fewer months or years than his actual sentence, if he violates his parole during the parole period, the balance of the actual sentence still remains to be served. So, too, should educational credit time be treated.

. . . .

BROOK and VAIDIK, JJ., concurred.

WRIGHT v. STATE, No. 29A02-0102-CR-120, ___ N.E.2d ___ (Ind. Ct. App. Aug. 10, 2001).
NAJAM, J.

On April 11, 1999, Wal-Mart loss prevention officers Randall Smith, John Mulheran, and Margaret Bickle observed Wright enter the Carmel Wal-Mart store carrying two bags of clothing. The officers watched as Wright placed the bags of clothing on a counter at the service desk, took an empty shopping cart, and proceeded to the housewares section of the store. Bickle saw Wright remove items from the shelves in the housewares aisle, and all three loss prevention officers saw Wright return to the service desk with his cart full of pots, pans, and flatware. Wright left the cart of goods at the service desk and went back out to the parking lot, where he and a companion unloaded more pots and pans from a car into a second shopping cart. The officers then watched Wright get in line at the service desk with both shopping carts full of goods.

As Wright waited in line, one of the loss prevention officers told a manager to authorize a refund for anything Wright attempted to return, regardless of whether he had a receipt. Accordingly, when Wright requested a refund for all of the items in both shopping carts, including items that he had taken off the shelves and items that he had retrieved from the car in the parking lot, he was given a full cash refund, totaling $880.57. Wright then left the store, and the loss prevention officers stopped him in the parking lot with the money.

. . . .

Wright challenges the sufficiency of the evidence supporting his conviction for theft. . . .

. . . Wright contends on appeal that the State failed to prove that his control over Wal-

Mart's money was "unauthorized" within the meaning of Indiana Code § 35-43-4-1(b). The trial court defined "unauthorized" in its jury instructions by quoting portions of Indiana Code Section 35-43-4-1(b), which provides in relevant part:

> a person's control over property of another person is "unauthorized" if it is exerted:
>
> (1) without the other person's consent;
>
> (2) in a manner or to an extent other than that to which the other person has consented; [or]
>
> . . .

The question presented is an issue of first impression. We have not previously considered the meaning of the word "consent" as used in subsections (1) and (2) of this statute. . . .

"Consent" is defined as: "agreement, approval, or permission as to some act or purpose, esp[ecially] given voluntarily by a competent person." BLACK'S LAW DICTIONARY 300 (7th ed. 1999). All three Wal-Mart loss prevention officers testified that they knew that Wright was returning items which he had not previously purchased. [Footnote omitted.] Nonetheless, officer Smith "called the manager and told him to approve [the returns]." [Citation to Record omitted.] We conclude that when Wal-Mart approved the returns, it consented to give Wright money in exchange for the merchandise he "returned."

Indiana Code Section 35-43-4-1(b) makes no distinction between actual and apparent consent, and we are bound by the ordinary and plain meaning of the word. [Citation omitted.] Although it was a deception, Wal-Mart voluntarily and expressly authorized the refund and thereby gave its consent. But for Wal-Mart's consent, there would have been no theft. We are constrained to hold that Wright obtained the refund with Wal-Mart's consent, within the meaning of Indiana Code Section 35-43-4-1(b)(1) and (2).

Wright further contends that his possession of the money was not unauthorized under Indiana Code Section 35-43-4-1(b)(4) because he did not create a false impression. Again, we must agree. A defendant cannot create a false impression in one who knows the defendant's representation to be false. [Citation omitted.] Here, Wal-Mart approved Wright's return knowing that he was attempting to pass off its goods as his own. Under these circumstances, no false impression was or could have been created.

Since Wal-Mart consented to the refund, and Wright did not create or confirm a false impression in Wal-Mart that the property at issue was his own, the State failed to prove that Wright exercised unauthorized control over Wal-Mart's property, and the evidence was insufficient to support his conviction for theft. Wright concedes, however, that the evidence most favorable to the judgment supports a conviction for the offense of attempted theft. [Citation omitted.] This court may order a modification of the judgment of conviction to that of a lesser included offense because of insufficiency of evidence on a particular element of the crime. [Citation omitted.] . . . [W]e remand this cause to the trial court to modify the judgment of conviction against Wright to the offense of attempted theft, and the judgment so modified is affirmed. [Footnote omitted.]

. . . .

SHARPNACK, C. J., and RILEY, J., concurred.

ZAWACKI v. STATE, No. 35A02-0012-CR-771, ___ N.E.2d ___ (Ind. Ct. App. Aug. 10, 2001).

BAKER, J.

The facts most favorable to the verdict are that on June 15, 2000, fifteen-year-old S.H. went to K.Z.'s house to visit with her. K.Z.'s father, Zawacki, was home at the time, as

were other members of K.Z.'s family. At one point, Zawacki called S.H. into another room. Zawacki was seated next to his computer and he showed S.H. some pornographic photographs on the screen. Zawacki then produced three sexual devices and displayed them to S.H.

Later that evening, Zawacki offered to drive S.H. back to her house. Zawacki did not permit his daughter to go with them. While traveling toward S.H.'s home, Zawacki grabbed S.H.'s breasts and moved S.H.'s hand to his crotch area. Although Zawacki warned S.H. not to tell anyone, she reported the incident to her mother approximately one week later.

. . . Zawacki filed a "Motion For Offer Of Proof," requesting permission to offer a number of letters into evidence that S.H. had written to K.Z., demonstrating that S.H. was sexually attracted to K.Z. Zawacki also desired to offer evidence that S.H. had asked

Zawacki and his wife if they would permit her to have a lesbian relationship with K.Z. R. at 41. That motion further asserted that the Zawackis had denied S.H.'s request and, therefore, S.H. falsely accused Zawacki of committing the charged offense because she was biased against him. . . . The trial court granted the State's motion in limine and S.H. denied, on cross-examination, that she had asked the Zawacki's permission to engage in a sexual relationship with K.Z. Thereafter, Zawacki attempted to introduce the letters into evidence that S.H. had written to K.Z., which purportedly demonstrated S.H.'s sexual feelings for K.Z. The trial judge excluded this evidence and also ruled that Zawacki could not testify that he had refused S.H.'s request for permission to engage in a lesbian relationship with K.Z. . . .

. . . .

Turning to the circumstances presented in the instant case, we first note that the State posited its motion in limine in accordance with the provisions of our Rape Shield Law. [Footnote omitted.] In relevant part, this statute provides that:

> (a) In a prosecution for a sex crime, evidence of the past sexual conduct of a victim or witness may not be admitted, except:
>
> (1) evidence of the victim's or of a witness's past sexual conduct with the defendant;
>
> (2) evidence which shows that some person other than the defendant committed the act upon which the prosecution is founded.

[Citations omitted.] . . .

The State leads us to several reported cases in support of its contention that the evidence offered by Zawacki in response to S.H.'s denial that she ever desired to have a sexual relationship with K.Z. was properly excluded. In each of those cases, however, we note that evidence of a prior sexual relationship was involved. [Citations omitted.]

Here, the evidence that Zawacki sought to offer at trial does not concern any actual prior sexual activity or conduct on S.H.'s part. The letters contain only written matter, and the request by S.H. to Zawacki only amounted to verbal conduct. The content of the letters and the request directed to the Zawackis by S.H. regarding a possible relationship with their daughter are demonstrative of S.H.'s intentions. The evidence that Zawacki sought to present to the jury was intended to impeach S.H.'s credibility by demonstrating bias, prejudice or an ulterior motive as to her claim against Zawacki. We cannot say that this was an instance where Zawacki sought to introduce this evidence solely for the purpose of prejudicing S.H. in the eyes of the jury. [Citation omitted.] Simply put, the evidence that Zawacki sought to offer did not fall within the confines of our Rape Shield Law. Rather, Zawacki sought to use this evidence in order to show bias on the part of S.H.

. . . Inasmuch as the trial court refused to admit the letters and the evidence of S.H.'s

request into evidence, that exclusion was error.

We also note that the error cannot be deemed as harmless. . . .

. . . .

FRIEDLANDER, J., concurred.

RILEY, J., filed a separate written opinion in which she dissented, in part, as follows:

> I respectfully dissent. . . .
>
> . . . I cannot understand how a request to engage in a lesbian relationship could be anything other than an attempt to introduce evidence that implies past sexual conduct. . . .
>
> . . . .

If, in fact, Zawacki believed that this evidence should have been admitted under Indiana Evidence Rule 412, he should have filed a written motion describing the evidence at least 10 days before trial. Evid.R.412(b)(1). This he failed to do so that the evidence was properly excluded.

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CASE CLIPS TRANSFER TABLE

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This table lists recent grants of transfer by the Indiana Supreme Court for published decisions of the Court of Appeals. It includes Judicial Center summaries of the opinions of the Court of Appeals vacated by the transfers and of the Supreme Court's opinions on transfer.

A CASE CLIPS transfer information feature was suggested by the Justices of the Indiana Supreme Court in response to trial court requests for more accessible information about grants of transfer. The table is prepared with assistance from the Supreme Court Administrator's Office, which sends the Judicial Center a weekly list of transfer grants.

A grant of transfer vacates the opinion of the Court of Appeals: "[i]f transfer be granted, the judgment and opinion or memorandum decision of the Court of Appeals shall thereupon be vacated and held for naught, except as to any portion thereof which is expressly adopted and incorporated by reference by the Supreme Court, and further, except where summarily affirmed by the Supreme Court." Indiana Appellate Rule 11(B)(3).

Case Name	N.E.2d citation, Ct. Appeals No.	Court of Appeals Holding Vacated by Transfer Grant	Transfer Granted	Supreme Court Opinion After Transfer
Owens Corning Fiberglass v. Cobb	714 N.E.2d 295 49A04-9801-CV-46	Defense should have received summary judgment as plaintiff showed only that he might have been exposed to its asbestos	01-19-00	
Felsher v. City of Evansville	727 N.E.2d 783 82A04-9910-CV-455	University was entitled to bring claim for invasion of privacy; professor properly enjoined from appropriating "likenesses" of university and officials; professor's actions and behavior did not eliminate need for injunction; and injunction was not overbroad..	8-15-00	
Dow Chemical v. Ebling	723 N.E.2d 881 22A05-9812-CV-625	State law claims against pesticide manufacturer, with exception of negligent design, were preempted by federal FIFRA pesticide control act; pest control company provided a service and owed duty of care to apartment dwellers, precluding summary judgment.	8-15-00	
South Gibson School Board v. Sollman	728 N.E.2d 909 26A01-9906-CV-222	Denying student credit for all course-work he performed in the semester in which he was expelled was arbitrary and capricious; summer school is not included within the period of expulsion which may be imposed for conduct occurring in the first semester	9-14-00	
Moberly v. Day	730 N.E.2d 768 07A01-9906-CV-216	Fact issue as to whether son-in-law was employee or independent contractor precluded a summary judgment declaring no liability under respondeat superior theory; and Comparative Fault has abrogated fellow servant doctrine.	10-24-00	

Case Name	N.E.2d citation, Ct. Appeals No.	Court of Appeals Holding Vacated by Transfer Grant	Transfer Granted	Supreme Court Opinion After Transfer
Shambaugh and Koorsen v. Carlisle	730 N.E.2d 796 02A03-9908-CV-325	Elevator passenger who was injured when elevator stopped and reversed directions after receiving false fire alarm signal brought negligence action against contractors that installed electrical wiring and fire alarm system in building. Held: contractors did not have control of elevator at time of accident and thus could not be held liable under doctrine of res ipsa loquitur.		
S.T. v. State	733 N.E.2d 937 20A03-9912-JV-480	No ineffective assistance when (1) defense counsel failed to move to exclude two police witnesses due to state's failure to file witness list in compliance with local rule and (2) failed to show cause for defense failure to file its witness list under local rule with result that both defense witnesses were excluded on state's motion	10-24-00	
Tapia v. State	734 N.E.2d 307 45A03-9908-PC-304	Reverses refusal to allow PCR amendment sought 2 weeks prior to hearing or to allow withdrawal of petition without prejudice	11-17-00	
Tincher v. Davidson	731 N.E.2d 485 49A05-9912-CV-534	Affirms mistrial based on jury's failures to make comparative fault damage calculations correctly	11-22-00	
Brown v. Branch	733 N.E.2d 17 07A04-9907-CV-339	Oral promise to give house to girlfriend if she moved back not within the statute of frauds.	11-22-00	
New Castle Lodge v. St. Board of Tx. Comm.	733 N.E.2d 36 49T10-9701-TA-113	Fraternal organization which owned lodge building was entitled to partial property tax exemption	11-22-00	
Gallant Ins. Co. v. Isaac	732 N.E.2d 1262 49A02-0001-CV-56	Insurer 's agent had "inherent authority" to bind insurer, applying case holding corp. president had inherent authority to bind corp. to contract	11-22-00	7-23-01. No. 49S02-0011-CV-718. Inherent authority not applicable, but agent had apparent authority to bind corporation.
Reeder v. State	732 N.E.2d 1246 49A05-9909-CV-416	When filed, expert's affidavit sufficed to avoid summary judgment but affiant's death after the filing made his affidavit inadmissible and hence summary judgment properly granted.	1-11-01	
Holley v. Childress	730 N.E.2d 743 67A05-9905-JV-321	Facts did not suffice to overcome presumption non-custodial parent was fit so that temporary guardianship for deceased custodial parent's new spouse was error.	1-11-01	
Cannon v. Cannon	729 N.E.2d 1043 49A05-9908-CV-366	Affirms decision to deny maintenance for spouse with ailments but who generated income with garage sales	1-11-01	

Case Name	N.E.2d citation, Ct. Appeals No.	Court of Appeals Holding Vacated by Transfer Grant	Transfer Granted	Supreme Court Opinion After Transfer
Davidson v. State	735 N.E.2d 325 22A01-0004-PC-116	Ineffective assistance for counsel not to have demanded mandatory severance of charges of "same or similar character" when failure to do so resulted in court's having discretion to order consecutive sentences.	1-17-01	
Leshore v. State	739 N.E.2d 1075 02A03-0007-CR-234	(1) Writ of body attachment on which police detained defendant was invalid on its face for failure to include bail or escrow amount, and (2) defendant's flight from detention under the writ did not amount to escape.	1-29-01	
Mercantile Nat'l Bank v. First Builders	732 N.E.2d 1287 45A03-9904-CV-132	materialman's notice to owner of intent to hold personally liable for material furnished contractor, IC 32-8-3-9, sufficed even though it was filed after summary judgment had been requested but not yet entered on initial complaint for mechanic's lien foreclosure	2-09-01	
State Farm Fire & Casualty v. T.B.	728 N.E.2d 919 53A01-9908-CV-266	(1) insurer acted at its own peril in electing not to defend under reservation of rights or seek declaratory judgment that it had no duty to defend; (2) insurer was collaterally estopped from asserting defense of childcare exclusion that was addressed in consent judgment; (3) exception to child care exclusion applied in any event; and (4) insurer's liability was limited to $300,000 plus post-judgment interest on entire amount of judgment until payment of its limits.	2-09-01	
Merritt v. Evansville Vanderburgh School Corp	735 N.E.2d 269 82A01-912-CV-421	error to refuse to excuse for cause two venire persons employed by defendant even though they asserted they could nonetheless be impartial and attentive	2-09-01	
IDEM v. RLG, Inc	735 N.E.2d 290 27A02-9909-CV-646	the weight of authority requires some evidence of knowledge, action, or inaction by a corporate officer before personal liability for public health law violations may be imposed. Personal liability may not be imposed based solely upon a corporate officer's title.	2-09-01	
State v. Gerschoffer	738 N.E.2d 713 72A05-0003-CR0116	Sobriety checkpoint searches are prohibited by Indiana Constitution.	2-14-01	
Healthscript, Inc. v. State	724 N.E.2d 265, *rhrg.* 740 N.E.2d 562 49A05-9908-CR-370	Medicare fraud crimes do not include violations of state administrative regulations.	2-14-01	

Case Name	N.E.2d citation, Ct. Appeals No.	Court of Appeals Holding Vacated by Transfer Grant	Transfer Granted	Supreme Court Opinion After Transfer
Vadas v. Vadas	728 N.E.2d 250 45A04-9901-CV-18	Husband's father, whom wife sought to join, was never served (wife gave husband's attorney motion to join father) but is held to have submitted to divorce court's jurisdiction by appearing as witness; since father was joined, does not reach dispute in cases whether property titled to third parties not joined may be in the marital estate.	3-01-01	
N.D.F. v. State	735 N.E.2d 321 No. 49A02-0003-JV-164	Juvenile determinate sentencing statute was intended to incorporate adult habitual criminal offender sequential requirements for the two "prior unrelated delinquency adjudications"; thus finding of two prior adjudications, without finding or evidence of habitual offender-type sequence, was error	3-02-01	
Robertson v. State	740 N.E.2d 574 49A02-0006-CR-383	Hallway outside defendant's apartment was part of his "dwelling" for purposes of handgun license statute.	3-09-01	
Bradley v. City of New Castle	730 N.E.2d 771 33A01-9807-CV-281	Extent of changes to plan made in proceeding for remonstrance to annexation violated annexation fiscal plan requirement.	4-06-01	
King v. Northeast Security	732 N.E.2d 824 49A02-9907-CV-498	School had common law duty to protect student from criminal violence in its parking lot; security company with parking lot contract not liable to student under third party beneficiary rationale.	4-06-01	
State v. Hammond	737 N.E.2d 425 41A04-0003-PC-126	Amendment of driving while suspended statute to require "validly" suspended license is properly applied to offense committed prior to amendment, which made "ameliorative" change to substantive crime intended to avoid supreme court's construction of statute as in effect of time of offense.	4-06-01	
McCann v. State	742 N.E.2d 998 49A05-0002-CR-43	Photo array not improper; no prosecutorial misconduct; no error in attempted rape instruction; no error in sentencing refusal to rely on pregnancy of victim as not shown defendant knew of pregnancy.	4-12-01	6-20-01. 749 N.E.2d 1116. Pregnancy of victim may be an aggravating circumstance whether defendant knew of it or did not.
Dewitt v. State	739 N.E.2d 189	Trial court's failure to advise a defendant of his *Boykin* rights (trial by jury, confrontation, and privilege against self-incrimination) requires vacation of his guilty plea	4-26-01	
Buchanan v. State	742 N.E.2d 1018 18A04-0004-CR-167	Admission of pornographic material picturing children taken from child-molesting defendant's home was error under Ev. Rule 404(b).		

Case Name	N.E.2d citation, Ct. Appeals No.	Court of Appeals Holding Vacated by Transfer Grant	Transfer Granted	Supreme Court Opinion After Transfer
McCary v. State	739 N.E.2d 193 49A02-0004-PC-226	Failure to interview policeman/probable-cause-affiant, when interview would have produced exculpatory evidence, was ineffective assistance of trial. Counsel on direct appeal was ineffective for noting issue but failing to make record of it via p.c. proceeding while raising ineffective assistance in other respects. Post-conviction court erred in holding res judicata applied under *Woods v. State* holding handed down after direct appeal..	5-10-01	
Equicor Development, Inc. v. Westfield-Washington Township Plan Comm.	732 N.E.2d 215 No. 29A02-9909-CV-661	Plan Commission denial of subdivision approval was arbitrary and capricious, notwithstanding it was supported by evidence, due to Commission's prior approvals of numerous subdivision having same defect.	5-10-01	
Martin v. State	744 N.E.2d 574 No 45A05-0009-PC-379	Finds ineffective assistance of appellate counsel for waiving issue of supplemental instruction given during deliberations on accomplice liability.	6-14-01	
Segura v. State	729 N.E.2d594 No. 10A01-9906-PC-218	Notes possible effect of Williams v. Taylor, 529 U.S. 362 (2000) on Indiana cases on ineffective assistance of counsel for failure to advise correctly of penal consequences of guilty plea, while affirming conviction.	6-05-01	6-26-01. 749 N.E.2d 496. Assesses effect of federal decisions on Indiana caselaw and concludes "in the case of claims related to a defense or failure to mitigate a penalty, it must be shown that there is a reasonable probability that a more favorable result would have obtained in a competently run trial. However, for claims relating to penal consequences, a petitioner must establish, by objective facts, circumstances that support the conclusion that counsel's errors in advice as to penal consequences were material to the decision to plead."
Catt v. Board of Comm'rs of Knox County	736 N.E.2d 341 (Ind. Ct. App. 2000) No. 42A01-9911-CV-396	County had duty of reasonable care to public to keep road in safe condition, and County's knowledge of repeated washs-outs of culvert and its continued failure to repair meant that wash-out due to rain was not a "temporary condition" giving County immunity.	6-14-01	

Case Name	N.E.2d citation, Ct. Appeals No.	Court of Appeals Holding Vacated by Transfer Grant	Transfer Granted	Supreme Court Opinion After Transfer
Ind. Dep't of Environmental Mgt. v. Bourbon Mini Mart, Inc.	741 N.E.2d 361 No. 50A03-9912-CV-476	(1) third-party plaintiffs were collaterally estopped from pursuing indemnity claim against automobile dealership; (2) third-party plaintiffs were collaterally estopped from pursuing indemnity claim against gasoline supplier pursuant to pre-amended version of state Underground Storage Tank (UST) laws; (3) amendment to state UST laws, which eliminated requirement that party seeking contribution toward remediation be faultless in causing leak, did not apply retroactively so as to allow contribution for response costs that were incurred before its effective date; and (4) third-party plaintiffs' action against gasoline supplier to recover ongoing remediation costs was not time barred.	6-14-01	
In re Ordinance No. X-03-96	744 N.E.2d 996 02A05-0002-CV-77	Annexation fiscal plan must have noncapital services estimates from a year after annexation and capital improvement estimates from three years after annexation.	7-18-01	
Corr v. Schultz	743 N.E.2d 1194 71A03-0006-CV-216	Construes uninsured motorist statutes to require comparison of what negligent party's insurer actually pays out with amount of insured's uninsured coverage; rejects prior Court of Appeals decision, *Sanders*, 644 N.E.2d 884, that uninsured statutes use comparison of negligent party's liability limits to uninsured coverage limit ("policy limits to policy limits" comparison); notes that not-for-publication decision from same accident, *Corr v. American Family Insurance*, used *Sanders* to hold that the correct analysis was to "compare the $600,000 per accident bodily injury liability limit under the two policies covering Balderas [negligent driver] to the $600,000 per accident underinsured motor vehicle limit of the policies under which Janel [Corr] was an insured; transfer also granted 7-18-01 in this unreported *Corr* case.	7-18-01	
Buckalew v. Buckalew	744 N.E.2d 504 34A05-0004-CV-174	Interprets local rule "no final hearing may be scheduled and no decree of dissolution of marriage or legal separation shall be entered unless and until the prescribed [financial] disclosure form is filed" to be "jurisdictional" so that trial court which made the rule had no authority to conduct a hearing or enter a decree without the required disclosure forms or a waiver by both parties.	7-18-01	

Case Name	N.E.2d citation, Ct. Appeals No.	Court of Appeals Holding Vacated by Transfer Grant	Transfer Granted	Supreme Court Opinion After Transfer
Friedline v. Shelby Insurance Co.	739 N.E.2d 178 71A03-0004-CV-132	Applies Indiana Supreme Court cases finding ambiguity in liability policies' exclusions for "sudden and accidental" and "pollutant" as applied to gasoline to hold that "pollutants" exclusion as applied to carpet installation substances was ambiguous and that insurance company's refusal to defend, made with knowledge of these Supreme Court ambiguity decisions, was in bad faith.	7-18-01	
St. Vincent Hospital v. Steele	742 N.E.2d 1029 34A02-0005-CV-294	IC 22-2-5-2 Wage Payment Statute requires not only payment of wages at the usual frequency (e.g., each week, etc.) but also in the correct amount, so Hospital which relied on federal legislation and federal regulatory interpretation for its refusal to pay physician contract compensation amount was liable for attorney fees and liquidated damages under Statute.	7-18-01	
Smith v. State	748 N.E.2d 895 29A02-00100PC-640	Error to find PCR laches when petition was filed within 27 days of sentencing and all ensuing delays due to Public Defender; guilty plea to six theft counts, for stealing a single checkbook containing the six checks, was unintelligent due to counsel's failure to advise of "single larceny" rule; the theft of the checkbook and ensuing deposits of six forged checks at six different branches of the same bank in the same county "within a matter of hours" were a "single episode of criminal conduct" subject to limits on consecutive sentencing and counsel's failure to discuss the single episode limit also rendered plea unintelligent.	7-19-01	
Martin v. State	748 N.E.2d 428 03A01-0012-PC-412	Holds that no credit for time served is earned by one on probation as a condition of probation, distinguishing *Dishroon v. State* noting 2001 amendment providing for such credit is inapplicable.		

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